IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1351

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

JOHNS-MANVILLE PRODUCTS CORPORATION

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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June 1, 1978

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PETITIONER'S REPLY BRIEF

Petitioner submits the following comments in reply to the brief filed by respondent Johns-Manville Products Corporation (the Company).

1. Although the Company's brief dwells at length on the amount and nature of the disruption which occurred during the period prior to the lockout, it carefully avoids

any claim that *all* or even a substantial percentage of the employees were responsible for this disruption. It knows it could not support any such claim, since the Board found that all of the disruption—even assuming it was caused by sabotage—"could have been carried out by a single individual, acting on his own behalf and not on behalf of, or in concert with, other employees or the Union." (99a.)

2. The Company's theory seems to be that when in-plant disruption becomes sufficiently serious or severe, an employer should be permitted to lock out and permanently replace all of the employees without having to identify which employees were responsible for the disruption. This also appears to have been the theory of the court below. As we pointed out in the petition, however, no precedent supports this theory, and the Company cites none. Moreover, neither the court below nor the Company has articulated any test or standard for determining how much disruption must be shown before this rule can be invoked. Thus, if the decision below is permitted to stand, it will inject a large measure of uncertainty in an area of law which has heretofore been settled, foster litigation, and encourage other employers to seize upon any disruption as a pretext for ridding themselves of a unionized work force.

3. The difficulties inherent in applying the rule advocated by the Company are well illustrated by the facts of this case. The Company's brief makes it appear that there was widespread, continuing, and severe sabotage over an extended period of time. But Judge Wisdom, looking at the same facts, reached quite different conclusions. For example, with respect to the paper breaks, Judge Wisdom stated:

> If the administrative law judge's facts are used, the company experienced less than one additional paper break per shift during August through October 1973.

This is not a significant increase and disproves the contention that a substantial number of workers participated in concerted activity. Indeed, as the administrative law judge concluded, the more reasonable inference is that the workers were not responsible for the breaks or that one or two dissidents caused the disruptions.

The inference that a substantial number of workers did not create the disruptions is bolstered by the history of mechanical problems that periodically caused increases in breaks. The record contains evidence of unusually frequent breaks in January, May, and July of 1973, long before any negotiations. An employee testified that excessive breaks in January caused the company to change its policy about shutting down machines to remove paper after a break. Before January 1973, management relied on regular cleaning crews to pick-up the waste. But the increase in breaks in early 1973 prompted the company to grant supervisors the discretion to order paper removed from scrap pits. (20a.)

With respect to the presence of scrap metal in the machinery, Judge Wisdom stated:

> The majority submits that the workers sabotaged the plant by inserting scrap metal into the machinery. Specifically, the opinion states that the workers inserted ball bearings into a grinder shortly after the October 3 bargaining session. How the majority determined that workers had placed the metal in the production process is unclear. No direct evidence supports that conclusion. Even the company, at the October 3 bargaining session, acknowledged the more reasonable inference that small pieces of metal such as ball bearings were probably mixed with the wood chips ground to make paper slurry. After union officers pointed out instances of metal damage in August, including the jamming of a defibrator with ball bearings, company officials admitted that the

company was not accusing its employees of placing metal in the wood. As of October 3, then, the facts do not support the inference that any worker engaged in an in-plant strike by jamming machinery with metal. During the period after October 3, the evidence connects no individual worker to the metal jams, and the majority fails to specify when the introduction of foreign materials into the production process amounted to a strike. Because the number of jams and the amount of metal was so small, the Board's conclusion that one or two disgruntled employees caused the jams finds substantial support in the record. (23a.)

With respect to the disconnecting of a power switch and the cutting of a wire mesh cylinder, Judge Wisdom stated:

> The record contains no direct evidence as to the cause of either the disconnecting of a major power switch or the cutting of a wire mesh cylinder on October 2. The majority uses the incidents to support its theory of an in-plant strike. Both occurrences support the Board's conclusion that only one or two workers acting independently created several of the disruptions. It takes only one person to throw a switch or to cut a cylinder. If a group had been involved in either incident, the participants probably would have been detected. The majority has therefore failed again to demonstrate that a substantial number of employees sabotaged the plant or otherwise engaged in an in-plant strike. (23a-24a.)

Finally, Judge Wisdom pointed out that there was only one day, October 22, on which the Company experienced a substantial loss of production. Aside from that day, production during the pre-lockout period "ranged from 104 tons a day to 112 tons a day," compared with a normal average of "110 tons a day during non-negotiating periods." (22a.)

4. The Company's brief repeats the contention, which it made repeatedly below, that due to the nature of its

operations disruption and sabotage can be carried out "surreptitiously," and that it is "virtually impossible to identify the guilty parties." (Br. 3.) This contention, however, is unsupported by any finding of the Board. On the contrary, the Board found that the Company made no "in-plant investigation in an effort to ascertain who was responsible for such disruptive activities." (97a.) As Judge Wisdom pointed out, such an investigation was entirely feasible:

> With 107 production employees, management had to supervise only 35 workers on each shift. Supervisors were in the plant; guards could have been added. Although the majority contends that the expanse of the plant prevented adequate supervision, the facts do not show that the disruptions occurred in all of the buildings. Instead, they occurred in only three. If the breaks were as numerous as the majority contends, a tally of them might have revealed a pattern permitting further narrowing of the scope of supervision. Because the company destroyed all records about these disruptions (company policy requires records to be kept for one year), it could not now determine whether the breaks usually occurred in the vicinity of particular workers. Nevertheless, the facts provide little support for the contention that detection was impossible at the time when the information was available. The reasonable inference is that the company failed to identify any saboteurs because the small increase in breaks did not warrant an investigation. (21a-22a, footnotes omitted.)

5. The Company attempts to distinguish prior cases which hold that only employees who are shown to have engaged in misconduct may be discharged by contending that the employees in this case were not discharged but merely replaced. The fact is, however, that the permanent replacement of *locked-out* employees, unlike the permanent replacement of *strikers*, is equivalent to a discharge.

It is true, as the Company points out, that when a *striking* employee is replaced he does not lose his employment status. Thus, if the striker's job again becomes vacant after the strike ends, he has a right to reinstatement. See *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). So long as the strike continues, however, the strikers may be replaced, and if any replacements should leave while the strike is still in progress, other replacements may be hired.

The power to end a strike, of course, rests with the strikers themselves. But the power to end a lockout rests with the employer. Thus, in this case, the locked-out employees had no prospect whatever of regaining their jobs once they had been permanently replaced. Even if a replacement were to leave, the original employee would not be recalled. The Company would undoubtedly take the position that the lockout was still in effect, and merely hire a new permanent replacement.

Indeed, it is precisely for this reason that the permanent replacement of locked-out employees is, as the Board held, inherently destructive of statutory rights. It is one thing to say that an employer can lock out his employees pending settlement of a collective-bargaining dispute, and quite another thing to say that the locked-out employees can be permanently replaced. Once the employees are permanently replaced the employer has no incentive to settle the dispute or terminate the lockout. Thus, the effect of locking out and then permanently replacing employees because their union is unwilling to agree to the employer's terms is precisely the same as discharging the employees for that reason. Such action totally undermines the statutory right of employees to organize and bargain collectively.

6. Petitioner does not contend, as the Company suggests, that employees who commit "individual sabotage"

should be "rewarded," or that an employer cannot take effective action to prevent or punish such sabotage. What we do contend, and what all prior cases have held, is that only the guilty may be punished. The court of appeals' departure from this fundamental principle is not a mere "footnote"; it is a decision of far-reaching significance which should be reviewed by this Court.

Respectfully submitted,

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